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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

UNITED STATES OF AMERICA,
Plaintiff,
v.
ELIZABETH A. HOLMES and RA
“SUNNY” BALWANI,
Defendants

Case No. 18-cr-00258-EJD

**ORDER DENYING MOTION TO
DISMISS SUPERSEDING
INFORMATION**

Re: Dkt. No. 399

Before the Court is Defendants' Motion to Dismiss the Superseding Information, Dkt. No. 391. This order follows full briefing and oral argument. For the following reasons, the Court DENIES Defendants' motion.

I. BACKGROUND

The Government filed a Superseding Information on May 8, 2020, Dkt. No. 391 (“Superseding Inf.”), which followed the then-operative Superseding Indictment, Dkt No. 39. In response, on May 18, 2020, Defendant Holmes filed the instant motion to dismiss the Superseding Information. Dkt. No. 399 (“Mot.”). There, she contends that the filing of the Superseding Information violates her Fifth Amendment right to be tried only upon “a presentment or indictment of a Grand Jury.” U.S. Const. amend. V. *Id.* Defendant Balwani joins the motion in full. Dkt. No. 400. The Government filed their opposition on May 26, 2020, Dkt. No. 408 (“Opp.”), and Defendants replied on June 1, 2020, Dkt. No. 409 (“Reply”).

Then, on July 14, 2020, the Government filed a Second Superseding Indictment (“SSI”). Dkt. No. 449 (“SSI”). The parties were given the opportunity to address the effect (if any) of the

1 SSI on the motion to dismiss the Superseding Information at the hearing, which the Court held via
2 Zoom on July 20, 2020. Dkt. No. 408. The SSI was subsequently superseded by the Third
3 Superseding Indictment (“TSI”). Dkt. No. 469 (“TSI”).

4 **II. DISCUSSION**

5 Defendants move to dismiss the Superseding Information on the ground that it violates the
6 Fifth Amendment to the U.S. Constitution and Federal Rule of Criminal Procedure Rule 7(a)(1).
7 Mot. at 1. A criminal defendant has a Fifth Amendment right to be tried only upon “a presentment
8 or indictment of a Grand Jury,” U.S. Const. amend. V, which neither Defendant has waived.
9 Federal Rule of Criminal Procedure Rule 7(a)(1) similarly provides that any offense “punishable
10 . . . by imprisonment for more than one year” “must be prosecuted by an indictment.” Fed. R.
11 Crim. P. 7(a)(1). These protections apply when the Government seeks to amend the charges
12 against a defendant: “[A]fter an indictment has been returned its charges may not be broadened
13 through amendment except by the grand jury itself.” *Stirone v. United States*, 361 U.S. 212, 215-
14 16 (1960). Because the Superseding Information was not returned by a grand jury, Defendants
15 argue that it must be “deemed without legal effect and dismissed immediately.” Mot. at 1.

16 The Government opposes dismissal. It acknowledges that the Superseding Information is
17 broader than the Superseding Indictment. The Government also concedes that the Superseding
18 Information does not permit it to prosecute the Defendants on any new charges, and that an
19 indictment is constitutionally required in order to do so. But the Government argues that the
20 Superseding Information here violates neither of those rules. Instead, the Government explains,
21 the Superseding Information “accomplishes two important purposes”: (1) “it permits the Court to
22 require the defendant to appear for further proceedings on the specific charges”; and (2) “provides
23 formal notice of the charges and satisfies the statute of limitations.” Opp. at 2. According to the
24 Government, the Superseding Information was necessary because grand jury proceedings in this
25 District were suspended on March 16, 2020 until June 2020 due to the COVID-19 public health
26 emergency. *See* General Order 72, IN RE: Coronavirus Disease Public Health Emergency
27 (adopted Mar. 16, 2020); General Order 72-2, IN RE: Coronavirus Disease Public Health
28

1 Emergency (adopted Apr. 30, 2020). The Government therefore asks the Court not to dismiss the
2 Superseding Information, and instead to consider its legal effect as those two issues arise.

3 The Court agrees with the Government. Again, it is undisputed that “the Fifth Amendment
4 and Federal Rule of Criminal Procedure 7 require that offenses punishable by imprisonment for
5 more than one year be prosecuted by indictment,” and that the Superseding Information does not
6 authorize the acceptance of a guilty plea or a trial on the relevant charges. Opp. at 1. It does not
7 follow, however, that the Superseding Information is “without legal effect” and must be
8 “dismissed immediately,” Mot. at 1. As the Seventh Circuit put it, Rule 7 “does not forbid filing
9 an information without a waiver; it simply establishes that prosecution may not proceed without a
10 valid waiver.” *United States v. Burdix-Dana*, 149 F.3d 741, 742 (7th Cir. 1998); *accord United*
11 *States v. Cooper*, 956 F.2d 960, 962 (10th Cir. 1992). In other words, it is the *prosecution* of a
12 defendant without an indictment that violates the Constitution and Rule 7—not the *filings* of an
13 information.

14 Moreover, the issues of whether the Superseding Information in fact “permits the Court to
15 require the defendant to appear for further proceedings on the specific charges” or “satisfies the
16 statute of limitations” for a later-returned indictment, Opp. at 2, are not currently before the Court.
17 The Government did not ask the Court to require Defendants to appear for any specific
18 proceedings based on the Superseding Information, and any statute of limitations issue would arise
19 under the SSI or the TSI rather than the Superseding Information. Consequently, the Court is not
20 prepared to say that the Superseding Information has no legal effect at this time. The Court will
21 determine the Superseding Information’s legal effect when the relevant issues are squarely
22 presented.

23 Thus, although the Court confirms that the Government may not prosecute the Defendants
24 on the expanded charges in the Superseding Information, dismissal of the document is not
25 warranted at this stage.

26 **III. CONCLUSION**

27 For the foregoing reasons, the Court will DENY without prejudice the Defendants’ motion
28 Case No.: 18-cr-00258-EJD-1
ORDER DENYING MOTION TO DISMISS SUPERSEDING INFORMATION

1 to dismiss the Superseding Information.
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4 **IT IS SO ORDERED.**
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6 Dated: September 11, 2020
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EDWARD J. DAVILA
United States District Judge

United States District Court
Northern District of California